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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 354.

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVERS AND
DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

**BRIEF OF RESPONDENT, THE TELLING-BELLE
VERNON COMPANY, OPPOSING PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT
OF OHIO.**

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BRIEF OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

This brief is filed by a respondent, The Telling-Belle Vernon Company, in opposition to the petition for a writ of certiorari to be directed to the Supreme Court of Ohio. For convenience, the petitioners, since they were plaintiffs or appellants in each of the three courts of Ohio, will be designated herein as the "plaintiffs," and the parties opposing this petition will be referred to herein as "defendants."

PROCEDURAL HISTORY OF THE CASE.

Plaintiffs filed their suit in equity in the Court of Common Pleas of Cuyahoga County, Ohio—a court of original and general equitable jurisdiction—seeking to enjoin the performance by the defendants of certain provisions of contracts of employment existing between the defendant dairies and the members of the defendant union of milk

wagon drivers. Plaintiffs' suit was based entirely upon their contention that these contracts precluded the defendant dairies from supplying the plaintiffs with milk and had been entered into pursuant to a combination of the defendant dairies and the Union alleged to be in violation of the Ohio Anti-Trust Act and of principles of common law since, it was charged, such combination was entered into for the primary or sole purpose of driving the plaintiffs from business, of fixing the retail price of milk in Cleveland and of creating a monopoly in the marketing of milk in the Cleveland area. The fifty odd dairies and the Union filed answers to this petition which, for the most part, constituted general denials. At the conclusion of the plaintiffs' case, after about a week of trial, the Court of Common Pleas granted the defendants' motion to dismiss the plaintiffs' petition on the ground that the plaintiffs had failed to prove their cause of action.

Thereafter, the plaintiffs appealed to the Court of Appeals of said County where they were entitled, under the Ohio statutory procedure, to a trial *de novo*. The plaintiffs there introduced before a Master appointed by the Court of Appeals not only the evidence offered by them in the lower court, but also a large amount of additional testimony including a stenographic transcript of everything spoken by the defendants in the negotiation of this employment contract. After consideration of this evidence, as well as that offered by the defendants, the Court of Appeals found as a fact that the plaintiffs had again failed to prove the existence of any conspiracy, unlawful under the provisions of the Ohio Anti-Trust Act or common law principles, but that, instead, the greater weight of the evidence demonstrated that the defendants had acted for the accomplishment of a lawful object through the use of legal means. The Court of Appeals, consequently, denied the prayer of the plaintiffs' petition and ordered its dismissal. Shortly thereafter, the Court denied the plaintiffs' motion

for a new trial or rehearing. The opinion of the Court of Appeals has not been officially reported but is copied in full in Appendix A of this brief.

The plaintiffs then filed an appeal in the Supreme Court of Ohio, as of right, on the ground that a question arising under the Constitution of the United States and under the Constitution of the State of Ohio was involved. They also filed a motion in the Supreme Court of Ohio requesting that Court to order the Court of Appeals to certify its record to the Supreme Court of Ohio on the ground that the case was one of great and general public interest. The defendants opposed this motion and moved that the appeal filed as of right be dismissed on the ground that no question arising either under the Constitution of the United States or under the State of Ohio was involved. After an examination of the entire record, the Supreme Court refused to grant the motion to certify the record and granted the defendants' motion to dismiss the appeal filed as of right, the Supreme Court holding that no debatable constitutional question was involved in the case. The Supreme Court of Ohio rendered no opinion but its finding and order are reported in 136 O. S. 582.

The plaintiffs now contend that this Court should order the Supreme Court of Ohio to certify its record to this Court under Title 28 U. S. C., Section 344-(b) of the Judicial Code.

PRESENTATION OF FEDERAL QUESTION.

The Record demonstrates that no mention of the Constitution of the United States, of any federal statute or of any right arising under either was made, at least until after the decision in the Court of Appeals. Plaintiffs in their motion for a new trial in the Court of Appeals complained that that court had erred in failing to find that:

“The right to conduct a lawful business free from malicious molestation and interference * * * is a basic property right guaranteed and protected by the Constitutions of the State of Ohio and of the United States,

and that it is unlawful * * * to interfere with that right, there being no legitimate trade dispute between the plaintiff and any of the defendants."

and also complained that,

"The defendants' acts * * * constituted a conspiracy * * * to drive the plaintiff-appellants out of business and thus destroy a valuable property right, contrary to the Constitutions of the State of Ohio and the United States."

These vague references to the Constitution are clearly inadequate to raise properly the requisite federal question.

Michigan Sugar Co. v. Michigan, 185 U. S. 112;
Herndon v. Georgia, 295 U. S. 441, 442 and 443;
Clarke v. McDade, 165 U. S. 168;
Capital City Dairy Co. v. Ohio, 183 U. S. 238;
Harding v. Illinois, 196 U. S. 78.

The plaintiffs, in their assignments of error to the Supreme Court of Ohio especially assignments numbers 7, 19, 20 and 21, for the first time made reference to a specific section of the Constitution of the United States, stating that the judgment of the Court of Appeals was "in violation of Article XIV, Section 1, Article I, Section 8 thereof."

These assignments related to the appeal filed as of right in the Supreme Court of Ohio on the ground that a question was involved in the case relating to either the state or federal Constitution. No opinion was rendered by the Supreme Court of Ohio. As indicated from the record in the cases of *Simms v. Elyria Savings & Trust Co.*, 296 U. S. 596; *Simms v. Savings Deposit & Trust Co.*, 296 U. S. 597; *Dennis v. New York Central R. Co.*, 296 U. S. 621, and as is suggested in Robertson and Kirkham "*Jurisdiction of the Supreme Court of the United States*," Section 78, footnote 15:

"Jurisdiction was wanting under the rule which requires, in the absence of an express decision of the federal question by the State Court, an affirmative

showing that the federal question did not fail of decision for want of proper presentation."

This is particularly true under Ohio procedure, since it is the well established law in that State that the Supreme Court will only consider questions specifically raised and determined in the court of first instance.

Stephenson v. Ohio, 119 O. S. 349.

In *Thatcher v. The Pennsylvania, Ohio and Detroit Rd. Co.*, 121 O. S. 205 (1929) the Court said:

"Where an error proceeding is filed in this court as of right, under a claim that it involves questions arising under the Constitution of the State of Ohio or the Constitution of the United States, and no motion is filed to certify the record, the Court will not hear and determine the same, unless it is shown that the constitutional questions were presented to and determined by the court of first instance."

Because of this rule in Ohio, it is submitted that this Court should not review Federal questions which were not raised in the trial court and upon which the Supreme Court of Ohio has made no express ruling.

Mutual Life Insurance v. McGrew, 188 U. S. 291.

THE CASE HAS BECOME MOOT.

The employment contract complained of was entered into in the latter part of 1937. Article XXXVI thereof (Plaintiffs-Appellants' Ex. 2) provides:

"This Agreement shall go into effect as of October 1, 1937 and continue in full force and effect until September 30, 1938 and continue thereafter for yearly periods, unless written notice of a contrary intention is given by either party thirty (30) days prior to September 30th in any year thereafter."

This defendant has recently received such notice from the Union that the contract is to terminate on September 30, 1940. The Union has today advised us that it has given

like notice to each other defendant dairy with whom it has such contract and will apply to this Court to supplement the Record by the establishment of such fact. Consequently all of the employment contracts complained of will have terminated prior to the hearing of the plaintiffs' petition. The plaintiffs have secured, without opposition from any of the defendants, temporary injunctions or restraining orders in each of the three state courts, the order issued by the Supreme Court of Ohio being still in effect, restraining the defendants from enforcing or performing the terms of the contract alleged to prohibit sales to the plaintiffs. Consequently no damage has been suffered by the plaintiffs, and in this suit they seek only an injunction against the performance of such provisions of these contracts. No injunction should, or can, be granted to restrain the performance of a contract which has by its very terms expired.

FACTUAL STATEMENT OF THE CASE.

Parties—The plaintiffs are about forty (40) individuals inaccurately but commonly referred to in the Record as "brokers." Actually they fall in the category of an itinerant retailer or peddler rather than a broker. These brokers own, or rent, and operate their milk wagons, purchasing pasteurized and bottled milk from dairies situated within Cuyahoga County, Ohio, and reselling it at a profit. (R. 87-91, 124-5, 488-91, 549, 550.)

The defendants, other than the Union and its officers, are established dairies owning and operating plants in Cuyahoga County, Ohio, purchasing their milk from the rural sections of said county and of adjacent counties in Ohio. There were about one hundred forty (140) of such dairies which pasteurized and bottled the milk so purchased by them, and usually delivered the bottled milk with their own delivery equipment operated by employee-drivers. The defendant Union was composed of several thousand drivers of milk wagons, each such driver working

as an employee of a particular dairy, selling his employer's bottled milk on a specified route, at a price and upon terms fixed by his employer and under a method of pay where at least sixty per cent (60%) of his compensation was derived from commissions based upon the amount of milk sold and delivered by him on his route or in his specified territory. (R. 320, 339-40, 361, 536.)

Milk is probably one of the most important and vital foods of the modern community. While it is one of the most necessary and wholesome of foods, the slightest and even an imperceptible contamination will render it a source of grave danger to the public health. -Consequently, governmental authorities have placed many restrictions upon the processing, sale and delivery of milk to the public.

Under these health regulations, milk which was sold by the dairy, either through the broker or through the employee of the dairy was identical, it was in the same bottle and bore the same bottle-cap. The broker's wagon was also required to bear the name of the dairy from which the broker purchased the milk and his wagon frequently, if not usually, bore the color scheme or insignia of the dairy. Also the broker frequently wore the uniform or cap of the employee-driver of that dairy. As a result it was practically impossible for the housewife to ascertain whether she was purchasing the milk of a particular dairy from a broker or from an employee-driver of that dairy. (R. 88-91, 124-5, 488-91, 612-13, 791-2, 831, 853-4.)

Under these circumstances, every incentive was afforded to the brokers to invade the route of the union-driver employed by the dairy from which the broker purchased milk, to take away such driver's customers by open competition, including a reduction in price from that which the driver was permitted by his employer to charge. Since at least sixty per cent (60%) of the driver's compensation was derived from commissions based upon his sales and collections, these actions of the broker destroyed or greatly de-

creased the driver's income and, in some instances, so crippled the driver's trade that he was discharged by his employer. (Plaintiffs-Appellants' Exhibit 4, R. 943-6, 377-9, 361.)

The union driver resented this, believing that while he expected to compete with drivers for other dairies, he alone was supposed to, and should, have the exclusive right to sell his employer's milk in his territory or upon his route. He resented the damage done to him by the broker, and believed that his employer was wholly unfair to him in supplying the brokers with a commodity indistinguishable from that which the driver sold, when such employer had every reason to know that, as a result of the employer's sales to brokers, the driver's commissions would be seriously curtailed. (R. 377, 943-5.)

This resentment became so intense that in July 1937, the Union served written notices upon all dairies employing its drivers that a different type of employment must be arranged. (R. 318.) The Union presented a written employment contract whereby the driver's pay would be placed almost entirely upon the basis of a fixed salary. (R. 558-9, 360-1, Defendants' Exhibit A.) The dairies refused, insisting upon the commission basis; consequently, a method of collective bargaining was put into effect, which has been in vogue in the milk industry in Cuyahoga County since the enactment of the National Industrial Recovery Act of 1933. This method of bargaining has been used because of the fact that the dairies as well as the Union appreciated the impossibility of the Union negotiating annually employment contracts with one hundred forty (140) or more dairies in this area, which, if separately negotiated, would have led to a great disparity in the income of the various drivers, in wage costs, hours of work and other elements of the dairies' cost of production and delivery. Pursuant to this method, various dairies appointed a negotiating committee and the Union appointed a like commit-

tee. These committees were not empowered to incur any obligation in behalf of any dairy nor on behalf of the Union, but were, instead, to attempt to adjust the controversy and to formulate a standardized and mutually acceptable contract of employment which, if adopted by a vote of the members of the Union, would be submitted by the Union to each dairy for its independent acceptance or rejection. (R. 927-30, 517-20.)

These committees having been appointed in the early fall of 1937, negotiations were begun and continued until about October 11th, 1937. (R. 930-3, 365-72, 385-7.) The parties were deadlocked on numerous issues including the question as to whether the driver's compensation should be by way of a fixed salary or should be upon a commission basis. (R. 367-9, 938.) The Union called a strike to be effective October 11th. (R. 366, 930-1.) Due to the public alarm at the consequences of such a strike, and to the intercession of Mr. Corrigan, counsel for the Union, the strike was held in abeyance and negotiations resumed. (R. 931-5.) After an inspection of the costs of production of several dairies (R. 936-7), the Union finally acceded to the commission basis of pay, but only upon the condition that the employer-dairy would refrain from selling to brokers, so that the union driver would be assured that he alone could sell his employer's milk upon his route. (R. 943-5, 379.) The employer's committee resisted, but finally agreed to this provision if the Union would postpone the effectiveness of this prohibition until May 1, 1938. The Union's committee consented and accordingly the standard contract was drawn so as to prohibit the dairy which employed union drivers from selling to brokers after said date. (R. 946.) This form of contract was submitted (R. 946-7), with the recommendations of the respective committees, to the interested parties, was approved by a vote of the members of the Union and, thereafter, submitted by the Union separately to each dairy for its independent acceptance or re-

jection. (R. 381-2, 517-8.) The contract was accepted by the great majority, but by no means by all of the dairies in the community, for at the time of the trial in the Court of Appeals there were some sixty (60) odd dairies operating in the Cleveland area which had no contract with the Union, and which were, apparently, able and ready adequately to supply the brokers. (R. 905-8.)

As the Court of Appeals found, this was clearly the adjustment of a valid labor dispute between employer and employee, whose sole objective was to negotiate a basis of pay and employment mutually acceptable and consistent with the protection of their own conflicting interests. The employer had every right to insist upon the commission basis which had prevailed for years in the industry, believing it necessary in order to assure the development of his business on the driver's route, the collection by the driver from the customer, the maintenance and appearance of the driver and his truck, etc. (R. 368-9.) Conversely, the driver had an equal right to insist that, if he were to work on a commission basis, he have the exclusive right to sell his employer's milk on his route and to require his employer to refrain from permitting his milk to be sold by brokers on the driver's route, since such practice had been actually proven destructive of the driver's commission and of his very job.

It is true that the Union's committee used every argument in attempting to persuade the employer to refrain from selling to brokers, the Union threatening to put the suspended strike in effect, and contending, among other things, that the broker was, in many respects, detrimental to the dairy industry, and that his elimination would not be detrimental but advantageous to the dairies themselves. However, it clearly appears from the Record that the employers were not persuaded by these arguments, and refused to give in until it was apparent that it was necessary to do so if the Union was to accede to the commission

basis. (R. 377-9, 940, 944-5, 396-8.) Surely this was a valid and sincere controversy between employer and employee whose sole purpose and objective was to reach a standard of employment and method of pay which was mutually acceptable and to avoid the calamitous consequences to themselves and to the public, resulting from a strike of the drivers of milk wagons.

Another contention made by the plaintiffs was that the defendants combined for the unlawful purpose of fixing prices. In 1937 and for years prior thereto, the driver's commission had been based upon the actual sale's price as fixed by his employer. (R. 941-3, 379-80.) These actual sales' prices varied greatly from dairy to dairy, especially in view of the fact that there were numerous wholesale discounts, and other adjustments or credits allowed by some dairies and not by others. (R. 941-3, 380-1.) As a result, the commission received by the drivers of one dairy for the same hours of work and for the sale of the same amount of milk might be much less than the commissions received by the driver of another dairy for the same sales and same work. This was naturally unsatisfactory to the drivers and their Union, and was one of the chief factors prompting the termination by the Union of the employment contract existing in the summer of 1937 and its demand for the substitution of the fixed salary for the commission. (R. 380-1, 941-3.)

When, after weeks of debate, the Union acceded to the commission basis, it required that these commissions be uniform so that whether or not the actual net sales' prices varied greatly from dairy to dairy, the amount of money paid as a commission to the driver per quart of milk sold by him should be uniform. After debating this subject for several days, it was agreed that the standard employment contract should so provide. (R. 941-3, 380-1.) Consequently, Article XXV thereof specifies that the commission should be computed and based upon certain specified prices

"regardless of the prices at which quarts of milk, bulk wholesale cream and bulk milk wholesale are actually sold * * *." As the Court of Appeals said:

"Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis."

The plaintiffs also alleged that the defendants combined for the purpose of creating a monopoly, but both trial courts which examined the facts found that no such purpose existed and that the actions of the defendants would not tend to create a monopoly in the marketing of milk. Instead, the Court of Appeals found that the sole purpose and objective of the defendants was to adjust a valid labor dispute, and that such adjustment did not tend toward a monopoly, saying:

"Of course there is little substance to this argument for the obvious reason that the present purchasers from brokers will decide from whom they will buy when the brokers abandon their routes, whether from the larger or smaller dairies."

there being at least one hundred forty (140) dairies in Cuyahoga County. (R. 320.)

We have set forth the foregoing facts in such detail to demonstrate that the case presented from the outset merely an issue of fact, that the plaintiffs have simply failed to prove the existence of any tenable cause of action, let alone the infringement of any constitutional right, and also to demonstrate that no federal question is either involved in, or necessary to, the determination of the case which relates only to the interpretation of the Ohio Anti-Trust Act and principles of common law relating to illegal conspiracies.

LAW.

We presume that there can be no argument but that in order to establish the unconstitutionality of a state statute, it must appear that the statute requires the performance or observance of some act of commission or omission which would impinge upon some right arising under the Constitution. The only statute which the plaintiffs have referred to is the Ohio Anti-Trust Law, and there is no claim made that this statute does impinge upon any constitutional right. Instead the plaintiffs complain that this Act has been construed by all of the state courts as not being applicable to the actions of the defendants, that it has been construed as not being broad enough to protect that which they term their constitutional rights. Surely, no state statute is needed for the protection of any constitutional right. Consequently there can be no claim under such circumstances that the statute itself is unconstitutional.

This is not a case where a state legislature has, by statute, sanctioned a course of conduct which it is claimed infringes upon constitutional rights. Rather a situation is presented where a state, in the exercise of its police power, has by statute expressly prohibited a combination of two or more for the purpose of restraining trade or of creating a monopoly or of fixing prices. The state courts in construing this statute have held that the acts of the defendants did not constitute any such combination within the meaning of that statute.

The question whether this state statute was or was not applicable is a question solely for the state courts. Each of the three state courts has successively construed this statute as not being applicable. The Court of Common Pleas held that the plaintiffs had failed to prove their cause of action, and the Court of Appeals, upon a trial *de novo*, held that the weight of the evidence demonstrated that no cause of action existed under the statute in these circumstances.

No federal statute is involved. No mention is made in the pleadings, briefs or evidence of either the Sherman or the Clayton Acts. While a contention is set forth in the plaintiffs' brief that interstate commerce is involved, no reference to the record is made in substantiation of such claim. The only statement in the record which can conceivably bear on the subject is the statement of the witness Diltz (R. 819, 820) that he did not know the extent of the area from which the consumers in Cleveland derived their milk, but stated that, in his opinion, such areas extended for approximately one hundred (100) miles from Cleveland. There is, however, no evidence that the milk purchased by any of the defendant dairies originated beyond Ohio, or that any of the plaintiffs or any of the defendant dairies sold, or delivered their milk for sale, outside of the Cleveland area. Plaintiffs are, of course, local peddlers who purchase and sell their milk within the Cleveland area. Their actions taken alone clearly cannot constitute interstate commerce. Even if their activities are considered as an integral step or part of the flow of milk coming from the farm to the Cleveland consumer, there is no evidence that any farm at which any of the defendants' milk originates is outside of Ohio. Therefore, even if the plaintiffs had attempted to invoke the provisions of any federal statute relating to, and based upon, congressional power over interstate commerce, such attempt would necessarily have been unsuccessful.

The plaintiffs state, as their fourth proposition (see page 12 of their brief), that the state courts have held that the defendants' actions did not affect interstate commerce. As far as we can discover no such question was presented to, considered or decided by, any Ohio court, there having been no contention made nor evidence offered that any transaction in interstate commerce was involved nor any claim that any federal statute regulating interstate commerce was violated.

The plaintiffs also advance, as one of their reasons for granting the writ, that the Supreme Court of Illinois in *Meadowmoor v. Milk Drivers Union*, 371 Ill. 377, 21 N. E. (2d) 308, has rendered a decision directly contrary to that of the Supreme Court of Ohio in this case, so that unless this Court settles the resultant inconsistency there will be confusion. This, if true, would afford no ground for granting the writ. There is, however, no conflict between the decisions of the Supreme Court of Ohio and Illinois in these instances. In the *Meadowmoor* case the defendant union attempted to eliminate the competition of the brokers or vendors by intimidation, and acts of violence, including the overturning of the brokers' wagons, the throwing of bombs and explosives into the stores which purchased milk from the brokers, assaults by pickets patrolling such stores, the intimidation of their customers, etc. (21 N. E. (2d) at 315.) The Supreme Court of Illinois held that, independently of the legality of the purpose of the combination, the use of such unlawful means should be enjoined. We frankly admit that, if the defendants in this case had resorted to any such unlawful means, an injunction should have been granted by the Ohio courts. There is, however, not a scintilla of evidence that any such conduct occurred in this case; instead, the Union committee and the employers' committee negotiated privately a form of employment contract, no broker being present at these meetings nor being advised, threatened or otherwise notified of the negotiations until the contract had been formulated, approved by the members of the Union and submitted by it independently to each dairy for its acceptance or rejection. The negotiation by employer and employee of an employment contract through collective bargaining is certainly not an unlawful means of accomplishing the purpose of adjusting a valid and bona fide dispute as to acceptable terms of employment.

Further there is no conflict, as contended by the plaintiffs, between the decisions of the Ohio court in this case and those of this Court.